

HAROLD REED,)
)
 Plaintiff)
)
 v.) **Docket No. 04-206-B-W**
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

The defendant moves to dismiss this action seeking judicial review of a denial of a claim for supplemental security income, contending that it was untimely filed. Defendant's Motion to Dismiss (Docket No. 4). I recommend that the court grant the motion.

On April 10, 2004 an administrative law judge issued a decision denying the plaintiff's claim for benefits. Declaration of Robin M. Marquis, etc. (filed with Docket No. 4) ¶ 3(a). The plaintiff requested review of this decision by the Appeals Council. *Id.* On September 17, 2004 the Appeals Council sent notice of its action on the plaintiff's request to the plaintiff and his then-representative by mail. *Id.* No request for an extension of time in which to file an action in this court was received by the defendant with respect to this claim. *Id.* ¶ 3(b). This action was filed on November 26, 2004. Docket.

II. Applicable Legal Standard

Judicial review following exhaustion of administrative remedies on a claim for social security benefits is limited by 42 U.S.C. § 405(g), which provides in relevant part: “Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.” The commissioner has by regulation allowed certain further time.

(a) General. A claimant may obtain judicial review of a decision by an administrative law judge if the Appeals Council has denied the claimant’s request for review, or of a decision by the Appeals Council when that is the final decision of the Commissioner.

* * *

(c) Time for instituting civil action. Any civil action described in paragraph (a) of this section must be instituted within 60 days after the Appeals Council’s notice of denial of request for review of the administrative law judge’s decision or notice of the decision by the Appeals Council is received by the individual, . . . except that this time may be extended by the Appeals Council upon a showing of good cause. For purposes of this section, the date of receipt of notice of denial of request for review of the administrative law judge’s decision or notice of the decision by the Appeals Council shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.

20 C.F.R. § 422.210.

III. Discussion

The defendant contends that the plaintiff did not file this action within 60 days of September 17, 2004 and that the action must therefore be dismissed. Memorandum in Support of the Defendant’s Motion to Dismiss (“Defendant’s Memorandum”) (filed with Docket No. 4) at 1. Allowing the five days after mailing specified by 20 C.F.R. § 422.210(c), sixty days after September 22, 2004 was November 21, 2004. This action was filed five days later.

In response, the plaintiff offers the affidavit of the individual who represented him before the agency who states that “[o]ur office did not receive the Notice of Appeals Council Action in this matter until September 27, 2004” Affidavit of Oral Tibbetts (attached to Docket No. 5) ¶ 2. He contends that this action was timely filed when the 60 days is counted from September 27, 2004. Opposition to Motion to Dismiss (“Opposition”) (Docket No. 5) at 2-3. The defendant points out in her reply that no similar sworn statement concerning the date on which the plaintiff actually received the notice has been provided and argues that the representative’s affidavit is insufficient under case law interpreting the regulation. Defendant’s Response to Plaintiff’s Opposition to Defendant’s Motion to Dismiss (“Reply”) (Docket No. 6) at 2-4.

Courts have differed on the question whether affidavits from the claimant and his or her representative stating a date of receipt beyond the five days presumed by the regulation are sufficient to overcome the presumption. *Compare Kinash v. Callahan*, 129 F.3d 736, 738 (5th Cir. 1997) (claimant’s sworn word that he did not receive notice insufficient to rebut presumption); *Roberts v. Shalala*, 848 F. Supp. 1008, 1015-17 (M.D.Ga. 1994) (affidavit of attorney’s receptionist insufficient); *Leslie v. Bowen*, 695 F. Supp. 504, 506 (D. Kan. 1988) (claimant’s affidavit insufficient); *Solberg v. Secretary of Dep’t of Health & Human Servs.*, 583 F. Supp. 1095, 1098 (E.D. Wis. 1984) (statements of claimant and father insufficient); *Rouse v. Harris*, 482 F. Supp. 766, 768-69 (D.N.J. 1980) (plaintiff’s assertion insufficient), *with Bartolomie v. Heckler*, 597 F. Supp. 1113, 1116 (N.D.N.Y. 1984) (fact that lawyer did not receive notice sufficient to rebut presumption). The plaintiff contends that this “issue was directly addressed by this court in *Ritchie v. Apfel*, Docket No. 98-226-B.” Opposition at 2.

In *Ritchie*, despite the fact that the claimant had duly informed the agency of his changes of address, the Appeals Council mailed the notice of its denial to the second of the three successive addresses which the

claimant had provided. *Ritchie v. Apfel*, 1999 WL 1995198 (D. Me. Mar. 11, 1999), at *1. The notice was forwarded to the claimant, whose appeal was filed with this court within 60 days of his receipt of the notice at the third address, but not within 65 days of the mailing of the notice. *Id.* The precise issue presented in the case now before the court was not raised in *Ritchie*. In *dictum*, I noted that the plaintiff's sworn statement concerning the date on which he received the notice was un rebutted and that "[n]othing further is required under 20 C.F.R. § 422.210(c)." *Id.* at *2. This statement is inconsistent with the First Circuit's citation with approval in *Piscopo v. Secretary of Health & Human Servs.*, 27 F.3d 554 (table), 1994 WL 283919 (1st Cir. June 27, 1994), of cases holding that affidavits of claimants and their counsel were insufficient to overcome the regulatory presumption. 1994 WL 283919 at **4. In addition to the factual distinction presented by the instant case, where there is no evidence of any error by the Appeals Council in mailing the notice, *Ritchie* must accordingly be distinguished by its unnecessary conclusion with respect to the applicable regulation, a conclusion that is at odds with the position of the First Circuit, which must control.

Even if the affidavits of a claimant and his representative about the date of receipt were deemed sufficient to overcome the regulatory presumption of date of receipt, the plaintiff has not provided anything beyond the assertions of his current counsel in a memorandum concerning the date on which he himself received the notice. This lack of evidence means that the plaintiff cannot overcome the regulatory presumption. *See Vine v. Bowen*, 1988 WL 35595 (N.D.Ill. Apr. 8, 1988), at *1 (evidence that claimant did not receive notice until four months after date of mailing insufficient when no evidence offered concerning date when her representative received notice).

The defendant's submissions discuss the reasons why equitable tolling of the regulatory limitations period is not appropriate in this case, Defendant's Memorandum at 4-5, Reply at 4-5, but the plaintiff does not argue that he is entitled to equitable tolling, and I accordingly do not reach this issue.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 4th day of March, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

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